United Merchant Finance Bhd v Chang Miau Sin

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–1674 OF 1999
KAMALANATHAN RATNAM J
23 OCTOBER 2000

Land Law *— Sale of Land — Order for — Variation of interest — Demand of sum in excess of what was due by increasing interest rate — Whether notice of increase in interest rate was served on the defendant*

This is the plaintiff's application for sale by public auction, the property of the defendant charged to the plaintiff in respect of a fixed loan granted by the plaintiff to the defendant as the latter's request. The base lending rate ('BLR') at that time was 10.65%, and interest was charged 0.5% above the BLR. Thus, the ruling rate of interest at that time was at 11.15%. It was a term of the loan that the 'chargee may from time to time, by a notice in writing of its intention so to do, increase or reduce the ruling rate of interest payable'. On the defendant's failure to satisfy the terms and conditions of the loan and the plaintiff applied for an order of sale. The defendant contended that he was never served with a notice in writing of the plaintiff's intention to increase the rate of interest but the plaintiff averred that it had advertised the increased rate of interest in *The Star* newspaper.

Held, dismissing the plaintiff's claim with costs:
If the plaintiff did indeed advertise the increased rate of interest in *The Star* newspaper, the question still arises whether the advertisement in the newspaper does constitute 'notice in writing' within the meaning of the loan agreement. In any case, if the plaintiff had indeed advertised, the least that the plaintiff could have done was to have exhibited in its affidavit the advertisement. This was not done. Therefore, there was no notice in writing served on the defendant informing the defendant of the increased rate of interest. In addition, the charge documents in the present case were executed by the defendant before the bank's solicitors, therefore the Court of Appeal decision of *Foo Yoke Foon v Public Bank Bhd* [2000] 3 MLJ 728 will not apply (see p 496A–C, E).

[Bahasa Malaysia summary

Plaintif telah memberikan satu pinjaman tetap kepada defendan atas permohonannya. Kadar pinjaman dasar ('KPD') pada masa itu adalah 10.65%, dan faedah yang dikenakan adalah 0.5% melebihi KPD. Oleh itu kadar yang mengawal faedah pada masa itu adalah 11.15%. Ia adalah terma pinjaman bahawa 'pemegang gadaian boleh dari masa ke semasa, melalui satu notis bertulis tentang niat berbuat demikian, menambah atau mengurangkan kadar kawalan faedah yang perlu dibayar tersebut'. Defendan gagal untuk memuaskan terma-

terma dan syarat-syarat pinjaman tersebut dan plaintif memohon satu perintah jualan melalui lelongan awam untuk menjual hartanah defendan yang telah digadaikan kepada plaintif. Defendan menegaskan bahawa beliau tidak pernah disampaikan satu notis bertulis tentang niat plaintif untuk menaikkan kadar faedah tetapi plaintif telah menegaskan bahawa ia telah mengiklankan kadar kenaikan faedah tersebut di dalam akhbar *The Star*.

Diputuskan, menolak tuntutan plaintiff dengan kos:

Sekiranya plaintif memang telah mengiklankan kadar kenaikan faedah tersebut, persolaln yang timbul adalah sama ada iklan di dalam akhbar tersebut membentuk satu 'notis bertulis' dalam lingkungan maksud perjanjian pinjaman. Di dalam apa keadaanpun, sekiranya plaintif memang telah mengiklankan, sekurang-kurangnya plaintif sepatutnya mengekshibitkan di dalam afidavitnya iklan tersebut. Ini tidak dilakukan. Oleh itu, tiada notis bertulis telah disampaikan ke atas defendan memaklumkan defendan tentang kadar kenaikan faedah tersebut (lihat ms 496A–C, E).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3101.

Cases referred to

Foo Yoke Foon v Public Bank Bhd [2000] 3 MLJ 728 (distd)

Jenny Toh (*Kington & Tan*) for the plaintiff.
SK Charanjit Singh (*SK Charanjit Seran & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

This is the plaintiff's application for sale by public auction, the property of the defendant charged to the plaintiff in respect of a fixed loan of RM130,000 granted by the plaintiff to the defendant at the latter's request. On the defendant's failure to satisfy the terms and conditions of the loan the plaintiff moved this court for an order for sale.

Findings of the court

It is a term of the loan (cl 7) that the 'chargee may from time to time by notice in writing of its intention so to do increase or reduce the ruling rate of interest payable'. The base lending rate ('BLR') at that time was 10.65% and the interest charged was 0.5% above the BLR, thus making the ruling rate of interest at 11.15%. The defendant pointed out that the notice of demand dated 3 March 1998 and addressed to the defendant stated that the plaintiff was claiming interest at '0.5% above the base lending rate

(currently at 13.2%) pa'. The defendant further pointed out that he was never served with a notice in writing of the plaintiff's intention to increase the rate of interest. Whilst the defendant has specifically raised this issue in his affidavit, the plaintiff replied in its affidavit that it had advertised the increased rate of interest in *The Star* newspaper. If indeed the plaintiff had done so, the question still arises whether advertisements in the newspapers constitute 'notice in writing' within the meaning of cl 7 of the loan agreement (the annexure to the charge). In any case, if the plaintiff had indeed advertised in *The Star*, then the least the plaintiff could have done was to have exhibited in its affidavit the advertisement in *The Star*. Even this was not done. In the circumstances, I was constrained to accept the defendant's submission that no notice in writing was given to him of the increase in the rate of interest.

However, the plaintiff referred me to a recent Court of Appeal decision in *Foo Yoke Foon v Public Bank Bhd* [2000] 3 MLJ 728, where on similar facts the court held that notwithstanding the fact that the interest claimed by the bank was in excess of the rate stipulated in the letter of offer and no notice was served of the variation of the interest rate, the fact that the appellant had executed the charge documents in the presence of his own solicitors, meant that he could not be heard to say that the variation of the interest was a unilateral act. The Court of Appeal in *Foo Yoke Foon* made it very clear that 'on the facts' it was not prepared to hold that the appellant had established sufficient 'cause to the contrary'. In the case before me, counsel for the plaintiff, to a specific question from the court, confirmed that the charge documents were executed by the defendant before the bank's solicitors. In the circumstances, I held that the decision in *Foo Yoke Foon* would not apply to this case. I therefore, dismissed the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

Reported by Anitha MI Raman